John D' Silva v Anthony Moses

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W–03–150 OF 2000

GOPAL SRI RAM, ABDUL KADIR SULAIMAN AND ALAUDDIN JJCA

7 MARCH 2002

Civil Procedure *— Judge — Exercise of discretion — No misdirection in law by judge — Irrelevant considerations not taken into account of — Relevant considerations not omitted — Wrong question not asked — No manifest miscarriage of justice — Whether order of judge should be upheld*

Civil Procedure *— Res judicata — Nature and scope of doctrine — Approach of court in applying the doctrine*

The writ in this case was served on 9 March 1999. Defence was delivered on 23 November 1999 and the reply on 17 February 2000. An application for security for costs taken out on 5 August 1999 was heard and refused by the judge on 25 October 1999. The action by then had gone into case management. On 23 May 2000 — some one year and two months after the issuance of the writ, the defendants (appellants) applied to strike out the statement of claim. The judge however dismissed the application on the grounds of: (i) res judicata; and (ii) delay in making the application. The defendants (appellants) appealed to the Court of Appeal.

Held, dismissing the appeal. All costs in the Court of Appeal and the court below to follow the event of the trial:

(1) The judge erred when he thought that he was precluded by the doctrine of res judicata from dealing with the point raised. The doctrine of res judicata is not a technical doctrine. It is an illustration of the operation of equity in the field of procedure. It matters not whether it is called issue estoppel, cause of action estoppel or res judicata. A court is not to apply any of these branches of estoppel in a staccato and straight-jacket fashion. The court is bound to weigh the merits of the case and determine where justice lies. However in the instant case, the error of the judge did not produce any unfavorable consequence in the case (see pp 308F–G, 309A).

(2) Although the judge had expressed the view that the application had merits, he refused to grant it in the exercise of his discretion. There was no misdirection in law by the learned judge. He did not take into account irrelevant considerations nor did he omit relevant considerations. He had not asked himself the wrong question. There was no manifest miscarriage of justice. The order of the judge should be upheld (see p 309B–D).

A [**Bahasa Malaysia summary**

Writ dalam kes ini telah disampaikan pada 9 Mac 1999. Pembelaan telah dikemukakan pada 23 November 1999 dan jawapannya pada 17 Februari 2000. Satu permohonan sebagai jaminan untuk kos yang dipohon pada 5 Ogos 1999 telah didengar dan ditolak oleh hakim B pada 25 Oktober 1999. Tindakan tersebut pada ketika itu telahpun dikemukakan untuk pengurusan kes. Pada 23 Mei 2000 — lebih kurang satu tahun dan dua bulan selepas pengeluaran writ tersebut, defendan-defendan (perayu-perayu) telah memohon untuk membatalkan pernyataan tuntutan. Hakim bagaimanapun telah menolak permohonan tersebut atas alasan: (i) res judicata; dan C (ii) kelewatan dalam membuat permohonan tersebut. Defendan-defendan (perayu-perayu) telah membuat rayuan ke Mahkamah Rayuan.

Diputuskan, menolak rayuan tersebut. Semua kos di Mahkamah D Rayuan dan di mahkamah bawahan mengikut peristiwa perbicaraan:

(1) Hakim telah terkhilaf apabila beliau sangka beliau telah dihalang oleh doktrin res judicata daripada berbincang tentang perkara yang diutarakan. Doktrin res judicata bukan satu doktrin yang teknikal. Ia adalah satu gambaran tentang operasi ekuiti dalam E bidang prosedur. Yang penting bukanlah sama ada ia dipanggil persoalan estopel, kausa tindakan estopel atau res judicata. Mahkamah tidak seharusnya menggunakan mana-mana cabang estopel tersebut secara staccato dan terkongkong. Mahkamah terikat untuk menimbangkan merit-merit kes dan menentukan di mana terletaknya keadilan. Namun begitu dalam kes ini, F kekhilafan hakim tidak menyebabkan apa-apa akibat yang tidak menggalakkan dalam kes tersebut (lihat ms 308F–G, 309A).

(2) Walaupun hakim telah menyatakan pandangan bahawa permohonan tersebut mempunyai merit-merit, beliau telah menolak untuk membenarkannya dalam menggunakan budi G bicara beliau. Tiada salah arah dalam undang-undang yang dilakukan oleh hakim yang bijaksana. Beliau tidak mengambilkira pertimbangan-pertimbangan yang tidak relevan mahupun telah beliau meninggalkan pertimbangan-pertimbangan yang relevan. Beliau tidak bertanyakan persoalan yang salah. Tidak terdapat kesalahan pelaksanaan keadilan yang manifes. Perintah hakim H tersebut hendaklah dikekalkan (lihat ms 309B–D).]

Notes

For cases on judges, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras I 3156–3160.

For cases on the nature and scope of the doctrine of res judicata, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) para 5165

Cases referred to

Carl-Zeiss Stiflung v Rayner & Keeler Ltd & Ors (No 2) [1966] 2 All ER 536 (refd)

Chee Pok Choy & Ors v Scotch Leasing Sdn Bhd [2001] 4 MLJ 346 (refd)

Johnson v Gore Wood & Co (a firm) [2001] 1 All ER 481 (refd)

Appeal from: Civil Suit No S2(S5)–23–27 of 1999 (High Court, Kuala Lumpur)

Azhar Azizan Harun (*Karina Tong* with him) (*Shafee & Co*) for the appellant.

R Ledchumiah (*Ramamoorthy Ledchumiah & Co*) for the respondent.

Gopal Sri Ram JCA (delivering the judgment of the court): This is a defamation case coupled with a cause of action mounted for wrongful dismissal. The one arises out of the other: the first from the second.

The writ in this case was served on 9 March 1999. Defence was delivered on 23 November 1999 and the reply on 17 February 2000. An application for security for costs was taken out on 5 August 1999. It was heard and refused by the judge on 25 October 1999.

The action had by then gone into case management. On 23 May 2000, that is to say some one year and two months after the issuance of the writ, the defendants (appellants before us) took out an application to strike out the statement of claim. They failed. They now appeal to us and ask us to reverse the judgment.

The learned judge advanced two reasons for dismissing the application. First, he thought that he was precluded by the doctrine of res judicata from dealing with the point raised. In this, he fell into error. The doctrine of res judicata is not a technical doctrine. It is an illustration of the operation of equity in the field of procedure, that is to say adjectival law. Whether you call it issue estoppel, cause of action estoppel or res judicata matters not. A court is not to apply any of these branches of estoppel in a staccato and straight-jacket fashion. The court is bound to weigh the merits of the case and determine where justice lies.

If upon an examination of all the circumstances of the case, the court concludes that it would be unjust for a party in a given case to reventilate a point, or to ventilate a fresh point which he could fairly have raised in earlier proceedings, then it may no doubt be justified in coming to the conclusion that it would be unjust to permit the plaintiff to succeed. It would accordingly admit, as successful, a plea of procedural estoppel, be it cause of action estoppel, issue estoppel or res judicata. On the other hand, if the judge comes to the opposite conclusion on the facts, then of course, the plea of procedural estoppel may not succeed. Or to put it more accurately, the court will not permit the plea to succeed. This much is clear in the speech of Lord Upjohn in the case of *Carl-Zeiss Stiflung v Rayner & Keeler Ltd & Ors (No 2)* [1966] 2 All ER 536. That view of the matter was affirmed and followed by Lord Bingham of Cornhill in his speech in *Johnson v Gore Wood*

A *& Co (a firm)* [2001] 1 All ER 481. It is noteworthy that in *Johnson*, the plea of res judicata was not permitted to succeed. This court has applied these cases in *Chee Pok Choy & Ors v Scotch Leasing Sdn Bhd* [2001] 4 MLJ 346. But, for the reasons which we will state in a moment, our differing with the judge on this point produces no unfavorable consequence in the case.

B That brings us to the second ground advanced by the judge. He thought it was too late in the day, with case management nearing its tail end, to entertain the application to strike out. Although he expressed the view that the application had merits, he refused to grant it in the exercise of his discretion. The plaintiff has since then put in an application to amend his pleading to correct the error based on which the defendants made their C application. In these circumstances, it is inappropriate for this court to enter into the merits of the application to strike out. As we said a moment ago, this is a case involving the exercise of discretion. And the principles upon which this court acts in such matters are too well settled to merit recall. There is here no misdirection in law by the learned judge. Neither has he taken into account irrelevant considerations or omitted relevant D considerations. He has not asked himself the wrong question. There is no manifest miscarriage of justice.

For the reasons already given, we find it unnecessary to trouble counsel for the respondent to reply.

The appeal is dismissed. The order of the judge is upheld. All costs here E and below shall follow the event of the trial. The deposit is to be refunded to the appellant.

Appeal dismissed.

Reported by Peter Ling

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